

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Americorp and Local 32B-32J, SEIU, AFL-CIO.
Case 22-CA-24532

June 10, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On January 4, 2002, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order as modified.³

The Respondent has excepted to the judge's conclusion that the striking employees were unlawfully discharged, arguing, *inter alia*, two points: (1) that the Respondent did not have knowledge of any picketing on April 9, 2001, when it made the decision to discharge the employees, either because the picketing did not occur or, if it occurred, the Respondent did not see it; and (2) that the Respondent had enforced its "No Show/No Work" policy prior to April 9. For the reasons that follow, we find no merit in either argument.

With regard to the Respondent's first point, we note that in its brief, the Respondent admits that "if the supervisor saw the people picket on April 9th and informed the company, the people should not have been let go." Credible testimony shows that the Respondent did have such knowledge. On the evening of April 9, 2001, Area Manager Castillo observed the picketing and was informed by the workers that they were on strike; General Manager Miller received a letter from the Union between 1 and 2 p.m. on April 10, 2001, which had been signed on April 9, 2001, by the strikers, notifying the Respondent of the strike and making an unconditional offer for

the employees to return to work; a striking employee informed Regional Manager Cajax of the strike when Cajax called at approximately 5 p.m. on April 10, 2001, to inform him that he was being terminated; Cajax also observed the picketing on the evening of April 10, 2001, before terminating several striking employees in the presence of General Manager Miller; and Castillo once again observed the picketing on the evening of April 10, 2001, before discharging a striking employee. Therefore, the credited evidence shows that the Respondent knew the employees were on strike when it informed the employees that they were discharged on April 10, 2001.

With regard to the Respondent's second point, we note that Castillo credibly testified that he had not enforced the policy prior to April 9, 2001, the first day of the strike, and Norah Isaza, a discharged striker, gave unrebutted testimony that she had violated the policy in the past without being disciplined. We further observe that at the hearing, the Respondent was unable to relate any specific examples of enforcement of the policy prior to April 9, 2001. We therefore adopt the judge's finding that the striking employees were discharged in violation of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Americorp, Parsippany, New Jersey, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(a) and (b) and reletter the subsequent paragraphs.

"(a) Within 14 days from the date of this Order, offer Norah Isaza, Alejandro Ruiz, Roberto Licon, Francisco Velasquez, Antonio Ramirez, and Manuel Ocampo full reinstatement to their former positions, or if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges, discharging, if necessary, any replacements hired on or after April 10, 2001."

"(b) Make each of the above employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. June 10, 2002

Wilma B. Liebman, Member

William B. Cowen, Member

¹ No exceptions were filed to the judge's findings that (1) the economic strike converted into an unfair labor practice strike when the Respondent discharged the striking employees; and (2) the Respondent violated Sec. 8(a)(1) and (3) of the Act by failing to reinstate the strikers on their making an unconditional offer to return to work.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ We will substitute a new notice in accordance with our recent decision in *Ishikawa Gasket American, Inc.*, 337 NLRB No. 29 (2001).

Michael J. Bartlett,

Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge and refuse to reinstate employees because they have engaged in a protected strike.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Norah Isaza, Alejandro Ruiz, Roberto Licon, Francisco Velasquez, Antonio Ramirez, and Manuel Ocampo full reinstatement to his or her former job or, if any of those jobs no longer exist, to a substantially equivalent position, without prejudice to his or her seniority or any other rights or privileges previously enjoyed, discharging, if necessary, any replacements hired on or after April 10, 2001.

WE WILL make each of the above employees whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful discharges of the above employees and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

AMERICORP

Julie Kaufman, Esq., for the General Counsel.

Joseph Maddaloni, Jr. Esq., for the Respondent.

Joseph S. Fine, Esq. and *Rebecca A. Schleiffer, Esq.*, for the Union.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in Newark, New Jersey, on August 6, 8, and 9 and September 5 and 6, 2001.¹ On a charge filed on April 19, an amended complaint was issued on August 2, alleging that Americorp (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the parties on October 31.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with an office and place of business in Parsippany, New Jersey, is engaged in the business of providing cleaning, janitorial, and maintenance services at various locations in the State of New Jersey. It has admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted, and I find, that Local 32B-32J, SEIU, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The facts*

1. Background

The facility involved in this proceeding is located at 1 Sylvan Way, Parsippany, New Jersey. The building is managed by Mack-Cali Realty Company and Respondent provides janitorial services for the tenants in the building. Respondent employs approximately 7 night-shift employees whose hours are 6 to 10 p.m.

2. Union activities

The Union began its organizing activities among Respondent's night shift employees in February. During March the Union provided the employees with a petition for them to sign. The petition was entitled "We Deserve Justice" and complained about low wages and asked for health insurance. Five of the six alleged discriminatees signed the petition and it was delivered to the Mack-Cali office. Around April 2, the employees met with union representative, Alberto Bernardez. The employees were disappointed at not having received a response to their petition and voted in favor of going on strike.

3. Events of April 9

Gladys Rivera, a union organizer, appeared to me to be a credible witness. She testified that at approximately 5:30 Monday afternoon, April 9, she and Bernardez arrived at the facility. At around 6 p.m. five employees arrived and they and the union representatives proceeded to the parking area. Rivera told the employees, "Today is the day of the strike" and the employees

¹ All dates refer to 2001 unless otherwise specified.

answered “it’s okay.” Rivera and Bernardez handed the employees union T-shirts, caps, whistles, and strike signs. The workers began picketing around 6:15, shouting “Justice for cleaning workers.” Rivera testified that at approximately 6:20, Oscar Castillo, Respondent’s Area Manager, arrived and asked the picketers “what was happening”. One of the employees responded “we’re on strike.” Rivera testified that Castillo then parked his car and went into the building. About 10 minutes later Castillo came outside and asked the workers if “they were going to go to work.” One of the employees answered “No, we’re on strike.” Alejandro Ruiz, an employee at the facility, also appeared to me to be a credible witness. He largely corroborated Rivera’s testimony.

4. Events of April 10

Between 1 and 2 p.m. on April 10, the Union faxed a letter to Respondent. The letter, which had been signed by the employees the previous evening, stated:

We the employees of Americorp are hereby notifying you that we are on strike because of Americorp’s practices. We are making an unconditional offer to return to work at the beginning of our night shift on Tuesday, April 10th.

Ruiz credibly testified that he received a telephone call between 3 and 4 p.m. on April 10, from Ervin Cajax, Respondent’s regional manager. Cajax asked Ruiz what had happened the previous evening. Ruiz responded that since the employees did not receive a response to the petition that was given to Mack-Cali “we went out on strike.” Cajax told Ruiz that he “didn’t need our services” since the employees hadn’t notified the company that they “weren’t going to work.”

5. Testimony of Cajax

Ervin Cajax appeared to me to be a credible witness. He testified that the company has a “no show, no work” policy which provides that if an employee doesn’t notify the company in advance that he or she will not report for work, the employee is terminated. Cajax testified that employees are notified of this policy with their first paycheck and the policy is posted in the closets that the employees use.

Cajax testified that he received a call from Castillo around 6 or 6:30 p.m. on April 9. Castillo told Cajax that none of the employees showed up for work. Cajax told Castillo to immediately try to find replacements. Cajax testified that he tried to telephone the employees on the morning of April 10, to tell them that they were terminated, but that he wasn’t able to reach any of them. He further testified that he was able to reach Ruiz around 5 p.m. He testified that he told Ruiz that “they [were] terminated because they didn’t call, they didn’t show.” Cajax testified that he came to the facility at around 5:45 p.m. on April 10. Four of the employees were picketing. The union representative told Cajax that “I want to return your employees.” Cajax replied that the employees were terminated because “they didn’t call, they didn’t show.” Cajax also testified that he was not aware of any union activity prior to April 9 and was not aware of the petition handed to Mack-Cali.

B. Discussion and Conclusions

1. Concluding findings

Based on the credited testimony I find that the employees began picketing around 6:15 p.m. on April 9. At around 6:20 Castillo arrived and asked the picketers “what was happening”. One of the employees responded “we’re on strike”. The com-

pany then found replacements to do the night shift work. On Tuesday morning, April 10, Cajax attempted to call the employees to tell them that they were terminated, but was unable to reach them. In the early afternoon the Union sent a fax to Respondent making an unconditional offer for the employees to return to work at the beginning of the night shift that evening. Respondent did not accept the offer. Instead, at 4 or 5 p.m. Cajax telephoned Ruiz and told him that the employees were terminated. I also credit Cajax’s testimony that Respondent was not aware of the employees’ union activities prior to April 9, and was not aware of the petition handed to Mack-Cali in March.

2. Termination

Respondent contends that it had no knowledge of the employees’ grievances prior to April 9. Indeed, I have credited Cajax’s testimony that Respondent was not aware of the employees’ union activities prior to April 9, nor was it aware of the petition handed to Mack-Cali in March. However, it is well established that the act of going on strike is protected concerted activity, regardless of whether the employer had been given notice of the strike, or presented with a prior demand for a change in working conditions. See *NLRB v. Washington Aluminum*, 370 U.S. 9, 14 (1962); *Savage Gateway Supermarket*, 286 NLRB 180, 183 (1987).

Under *Wright Line*, 251 NLRB 1083, 1089 (1980), enf’d. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, the Board requires that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer’s decision. Once this is established, the burden shifts to the employer to demonstrate that the “same action would have taken place even in the absence of the protected conduct.”

I find that General Counsel has sustained its burden. The employees were discharged because they engaged in a strike. Respondent contends, however, that they were discharged because they violated the “no show, no work” policy. In the first place, Respondent’s argument is similar to the one made by the employer in *Savage Gateway*, supra, 286 NLRB at 183. There the employer contended that the employee was discharged “pursuant to its longstanding work rule requiring notification of absence to the store manager.” The Board held, however (id. at 183–184):

The Court in *Washington Aluminum*, however, found nothing “indefensible” in the employees’ walkout . . . ; and nothing in that opinion or subsequent authorities suggests that employers are free to restrict protected concerted activities through application of work rules simply on a showing that enforcement of such rules will help assure efficient operations during a strike.

In addition, Castillo admitted that prior to April 9, the “no show, no work” policy was not enforced. Accordingly, I find that Respondent has not satisfied its burden under *Wright Line*, supra, and that Respondent’s termination of the employees on April 10, for having engaged in a strike is a violation of Section 8(a)(1) and (3) of the Act.

3. Conversion of strike into unfair labor practice strike

While an employer may replace strikers, it may not terminate them because they engage in protected activity. *Laidlaw Corp.*, 171 NLRB 1366 (1968), enf’d. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U. S. 920 (1970). The Board has held that the

unlawful discharge of strikers is a violation of Section 8(a)(1) and (3) and “leads inexorably to the prolongation of a dispute.” *Vulcan-Hart Corp.*, 262 NLRB 167, 168 (1982), enf. granted in part and denied in part on other grounds 718 F. 2d 269 (8th Cir. 1983). See *Super Glass Corp.*, 314 NLRB 596, 597 (1994).

An economic strike may be converted by the actions of an employer into an unfair labor practice strike where an employer commits unfair labor practices during the strike, or there is a causal connection between the unfair labor practices and the prolonging of a strike. *Robbins Co.*, 233 NLRB 549 (1977). I have found that Respondent’s termination of the strikers on April 10, constituted an unfair labor practice. Accordingly, I conclude that the termination resulted in the economic strike being converted into an unfair labor practice strike. See *Super Glass Corp.*, supra, 314 NLRB at 597.

4. Failure to reinstate strikers

Once unfair labor practice strikers make an unconditional offer to return to work, an employer will be found to have violated Section 8(a)(1) and (3) of the Act if it fails to offer them immediate reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions. An employer must offer the strikers reinstatement even if permanent strike replacements have to be discharged. *Super Glass Corp.*, supra, 314 NLRB at 598. In the early afternoon of April 10, the strikers made an unconditional offer to return to work at the beginning of the night shift that evening. Respondent refused to reinstate them. This constitutes an unfair labor practice in violation of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By discharging and refusing to reinstate striking employees Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.
4. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain action designed to effectuate the policies of the Act. Respondent, having unlawfully discharged and failed to reinstate Norah Isaza, Alejandro Ruiz, Roberto Licon, Francisco Velasquez, Antonio Ramirez, and Manuel Ocampo, I shall order Respondent to offer them full and immediate reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing, if necessary to effectuate such reinstatement, any person hired by Respondent on or after April 10, 2001. In addition, Respondent shall make whole said employees for any loss of earnings they may have suffered from the time of their discharges to the date of Respondent’s offers of reinstatement. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, Americorp, Parsippany, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging and refusing to reinstate employees because they have engaged in a protected strike.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Norah Isaza, Alejandro Ruiz, Roberto Licon, Francisco Velasquez, Antonio Ramirez, and Manuel Ocampo immediate and full reinstatement to their former positions, or if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging, if necessary, any replacements hired on or after April 10, 2001, and make them whole for any loss of earnings, in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any references to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at the facility located at 1 Sylvan Way, Parsippany, New Jersey, copies of the attached notice marked “Appendix.”³ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or the facility involved in these proceedings is no longer serviced by Respondent, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current

² If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³ If this Order is enforced by a Judgment of the United States court of appeals, the words in the notice reading “posted by order of the national labor relations board” shall read “posted pursuant to a judgment of the united states court of appeals enforcing an order of the national labor relations board.”

employees and former employees employed by the Respondent at any time since April 10, 2001.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 4, 2002

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge and refuse to reinstate employees because they have engaged in a protected strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Norah Isaza, Alejandro Ruiz, Roberto Licon, Francisco Velasquez, Antonio Ramirez, and Manuel Ocampo immediate and full reinstatement to their former positions, or if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging, if necessary, any replacements hired on or after April 10, 2001, and make them whole for any loss of earnings, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful discharges of the above employees and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

AMERICORP